

**IT 00-6**

**Tax Type: Income Tax**

**Issue: Nexus (Taxable Connection With Or Event Within The State)  
Commerce Clause (U.S. Const.) Controversy**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

**THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS**

**v.**

**“Adirondack Truck Leasing, Inc.”  
Taxpayer**

**No. 98-IT-0000  
FEIN 00-0000000  
Tax yrs.: 1982-1987 & 1991-1996**

**Charles E. McClellan  
Administrative Law Judge**

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**ORDER ON TAXPAYER’S MOTION FOR SUMMARY JUDGMENT AND  
THE DEPARTMENT’S CROSS-MOTION FOR SUMMARY JUDGMENT**

This matter comes on for consideration of the motion for summary judgment filed by “Adirondack Truck Leasing, Inc.”. (referred to as “taxpayer” or “ATL”) and the Department’s cross-motion for summary judgment. Both parties filed memoranda in support of their motions.<sup>1</sup>

The taxpayer’s motion is supported by the sworn affidavit of “John Doe” the president of “ATL” based on his personal knowledge.<sup>2</sup> It is attached to the taxpayer’s memorandum as Exhibit A. Six additional exhibits are also attached to taxpayer’s memorandum lettered B through G. The Department’s motion is not supported by affidavit. The Department attached five exhibits lettered A through E.<sup>3</sup>

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<sup>1</sup> “ATL’s” memorandum filed in support of its motion is referred to by page number as “Taxpayer memo p”. The Department’s memorandum filed in support of its cross-motion is referred to by page number as “Dept. memo p.” Taxpayer’s reply memorandum is referred to by page number as “Reply memo. p”.

<sup>2</sup> Mr. “Doe’s” affidavit is referred to by paragraph number as “Doe Aff. ¶”.

<sup>3</sup> Dept. Ex. A is a copy of the Auditor’s Comments Section dated July 1, 1998, which is attached without the certificate of the Director of the Illinois Department Of Revenue. Dept. Ex. B is a copy of “ATL’s” standard lease.

The facts set forth in Mr. “Doe’s” affidavit are as follows:

**FACTS:**

1. “ATL” is a corporation organized under the laws of Wisconsin with its usual place of business located at 5467 South Ninth Street, Milwaukee Wisconsin 53221. “Doe” Aff. ¶ 3.
2. Mr. “Doe” has been employed by “ATL” since 1961, serving as secretary/treasurer since 1968 and as president of the company since August 1998. “Doe” Aff. ¶ 4
3. “ATL’s” business is renting and leasing trucks that it owns to commercial businesses. “Doe” Aff. ¶ 7.
4. “ATL” also provides services such as fueling, licensing, permitting, maintaining and repairing the vehicles it rents or leases. “ATL” may arrange for the reconciliation and payment of apportioned fuel taxes among the various states. *Id.*
5. “ATL” generates its income from its rental and leasing activities and other services including fixed lease and rental charges, mileage charges, fueling maintenance and repair charges. “Doe” Aff. ¶ 23.
6. “ATL” enters into rental and leasing contracts in Wisconsin, and performs its maintenance and other lease related services in Wisconsin. “Doe” Aff. ¶ 8.
7. “ATL” did not enter into any rental or lease agreements in Illinois during the years at issue. “Doe” Aff. ¶ 9

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Dept. Ex. C is a copy of a Westlaw report of Ball et al. v. Bonnier et al., a memorandum opinion of the U.S. District Court, N. D. Illinois dated July 18, 1996. Dept. Ex. D consists of copies of Wisconsin International Fuel Tax Agreement Fuel Quarterly Reports for the four quarters of 1994 and 1995 and the first quarter of 1996. Dept. Ex. E

8. “ATL” had no Illinois customers during the years at issue. “Doe” Aff. ¶ 10.
9. “ATL” provided no services in Illinois during the years at issue. “Doe” Aff. ¶ 11.
10. “ATL” maintained no offices or other facilities in Illinois during the years at issue. “Doe” Aff. ¶ 13.
11. “ATL” employed no personnel in Illinois during the years at issue. “Doe” Aff. ¶ 14.
12. “ATL” solicited no business in Illinois and did not advertise in the state during the years at issue. “Doe” Aff. ¶ 15.
13. “ATL” owned no real property in Illinois during the years at issue. “Doe” Aff. ¶ 16.
14. “ATL” did not domicile any trucks or other personal property in Illinois during the years at issue. “Doe” Aff. ¶ 17.
15. “ATL” maintained no bank accounts in Illinois during the years at issue. “Doe” Aff. ¶ 18.
16. “ATL” was not qualified to do business in Illinois under the Illinois Business Corporation Act, 805 ILCS 5/1.01, *et seq.* during the years at issue. “Doe” Aff. ¶ 19.
17. On some occasions during the years at issue, “ATL” rented or leased vehicles to non-Illinois lessees that operated those vehicles into or through Illinois. “Doe” Aff. ¶ 20.

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is a copy of a letter to taxpayer’s counsel from Mr. “Doe” dated Dec. 22, 1999, showing the detail of “ATL’s” sales for 1998.

18. The lessees exercised complete dominion and control over the vehicles and “ATL” exercised no control over the use, routing or destination of the vehicles it leased. *Id*; Taxpayer Ex. B ¶¶ 1, 9; Dept. Ex. B ¶¶ 1, 9.
19. The leased vehicles must “be operated by safe, careful and properly licensed drivers to be selected, employed, controlled and paid by [lessee], said drivers being conclusively presumed to be the agents of the [lessee] only.” Taxpayer Ex. B ¶3; Dept. Ex. B ¶ 3.
20. Lessees are required to carry public liability and property damage insurance protecting the lessor, lessee and lessee’s drivers. *Id*.
21. Lessees are responsible for all necessary licenses, permits, taxes and fees if the vehicle is operated outside of the state of Wisconsin unless otherwise specified in an attachment to the lease. Taxpayer Ex. B ¶¶ 1,9; Dept. memo Ex. B ¶¶ 1, 9.
22. Prior to the time when Illinois joined the International Fuel Tax Administration on January 1, 1994, “ATL” transmitted fuel tax reports (and, if called for in such reports, fuel tax payments) to Illinois on behalf of its lessees who rented or leased vehicles for which fuel taxes were apportioned and who operated the vehicles in Illinois. “Doe” Aff. ¶ 21.
23. All lessees took possession of the vehicles in Wisconsin during the years at issue. “Doe” Aff. ¶ 22.

#### **ISSUE AND PRAYER FOR RELIEF:**

The primary issue presented by the motions is whether the uncontroverted facts presented in the “ATL’s” motion for summary judgment show sufficient contact between “ATL” and the

state of Illinois to establish the “substantial nexus” necessary to constitutionally subject “ATL” to the Illinois income tax. Specifically, “ATL’s” motion asks for the following relief:

1. Summary judgment in favor of “ATL”.
2. A declaration that “ATL” is not subject to Illinois income tax for any of the years at issue.
3. A declaration that the Department of Revenue has no authority to subject to Illinois corporate income tax “ATL” or any other out-of-state corporation whose only contact with Illinois is the operation of the corporation’s vehicles in Illinois by and under the direction and control of a lessee.
4. A declaration that Section 304 of the Illinois Income Tax Act, 35 ILCS 5/304, and 86 Ill. Admin. Code §§ 100.3350(d) and 100.3370(c)(C)(ii) violate the Commerce Clause and the Due Process Clause of the United States Constitution insofar as those provisions permit the Department to subject to Illinois income tax “ATL” or any other out-of-state corporation whose only contact with Illinois is the operation of the corporation’s vehicles in Illinois by, and under the direction and control of a lessee.
5. Other relief as the administrative law judge deems appropriate.

The Department’s motion asks for summary judgment in its favor and such other relief, as the administrative law judge deems appropriate.

## **ANALYSIS AND ORDER:**

### **Summary Judgment**

A motion for summary judgment is proper if the pleadings, depositions, admissions on file, affidavits and exhibits show that there is no genuine issue as to a material fact. The non-

moving party's claim of conflicting facts unsupported by affidavits or depositions will not preclude the granting of summary judgment. Schmidt v. Hinshaw, et al, 75 Ill. App. 3d 516, 521 (1st Dist. 1979).

"ATL's" motion for summary judgment is supported by the affidavit of "John Doe", the president of "ATL". It is based on his personal knowledge. The Department's motion is not supported by any affidavit. Both parties attached exhibits to the memoranda in support of their motions for summary judgment. However, none of the attached exhibits were certified or, in the Department's case entered under the certificate of the Director.

In determining the existence of a genuine issue of material fact courts must consider the pleadings, depositions, admissions, exhibits, and affidavits on file and they must be strictly construed against the movant and in favor of the non-movant. Purtill v. Hess, 111 Ill.2d 229, 489 N.E.2d 867 (1986). If the movant supplies facts, which, if not contradicted, would entitle the movant to judgment as a matter of law, the opposing party cannot rely on his pleadings alone to raise issues of material fact. *Id.* Therefore, facts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counter-affidavit are admitted and must be taken as true for purposes of the summary judgment motion. *Id.* The sufficiency of an affidavit in support of or in opposition to a motion for summary judgment is governed by Supreme Court Rule 191. *Id.*

In its memorandum, the Department states that the affidavit of Mr. "Doe" "should be stricken because it is unsupported by any documents either certified or sworn to" as required by Supreme Court Rule 191. A careful reading of Mr. "Doe's" affidavit clearly shows that the statements set forth therein are based on his personal knowledge. They are not based on the exhibits attached to "ATL's" memorandum. Those exhibits, which are referred to only in

“ATL’s” memorandum, need not be certified. However, even if he had relied on them, failure to have them certified would have been a technical insufficiency that could have been disregarded because Mr. “ATL’s” experience with the company would qualify him as a competent witness. LaMonte v. City of Belleville, 41 Ill.App.3d 697, 355 N.E.2d 70 (5<sup>TH</sup> Dist. 1976). Therefore, the Department’s objection is unfounded.

The Department also states that the affidavit contains conclusions that are not facts. Specifically, the Department refers to paragraphs 12 and 22 of Mr. “ATL’s” affidavit. In paragraph 12, he states that “During the relevant years, “ATL” conducted no business in Illinois and engaged in no activities in Illinois that generated any income for the company.” “Doe” Aff. ¶ 12. In paragraph 22, Mr. “Doe” states that “ATL” generates income by entering into rental and leasing agreements with its customers. As I noted above, during the relevant years none of these agreements were entered into in Illinois. The lessees all took possession of the leased vehicles in Wisconsin. During the relevant years, “ATL” engaged in no activity in Illinois that generated any income for the company.” “Doe” Aff. ¶ 22.

Referring to these two assertions, the Department states that, “This is an inaccurate statement of fact as “ATL” leased its trucks to trucking companies that operated within Illinois and received lease payments as a result of that activity. These are not ‘facts’ but conclusions.” Dept. memo p. 22. On this basis, the Department argues that the affidavit should not be considered because it contains conclusions to which affiant could not competently have testified, citing International Soc. for Krishna Consciousness, Inc. v. City of Evanston, 53 Ill.App3d 443, 368 N.E.2d 644 (1<sup>st</sup> Dist. 1977).

I find that paragraph 12 in Mr. “Doe’s” affidavit, which is repeated as the last sentence in paragraph 22, is conclusory. Therefore, I also find that the last sentence in paragraph 22 is

conclusory.<sup>4</sup> When an affidavit contains statements which are conclusory only those statements should be stricken. Murphy v. Urso, 88 Ill.2d 444, (1981). If an affidavit contains improper material, only the tainted parts should be stricken. Wiszowaty v. Baumgard, 257 Ill. App.3d 812, 629 N.E.2d 624 (1<sup>st</sup> Dist. 1994). Therefore, I am striking paragraph 12 and the last sentence in paragraph 22 of Mr. “Doe’s” affidavit. The balance of his affidavit stands.

Mr. “Doe” testified that he has been employed by “ATL” since 1961, that he was appointed secretary/treasurer in 1968, and that he has been president of the company since 1998. This employment experience clearly qualifies him to testify as a competent witness regarding the manner in which “ATL” conducts its business. In context, the affidavit states that it is not “ATL” but lessees that operate the vehicles in Illinois. The objections of the Department to the affidavit of Mr. “Doe” are without merit. The balance of Mr. “Doe’s” affidavit, being uncontradicted, establishes that during the years at issue, “ATL” did not conduct business activities in Illinois.

As noted above, the rule on summary judgment documentation is that if the movant supplies facts which, if not contradicted, would entitle the movant to judgment as a matter of law, the opposing party cannot rely on his pleadings alone to raise issues of material fact. Purtill v. Hess, *supra*. Therefore, facts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counter-affidavit are admitted and must be taken as true for purposes of the summary judgment motion. *Id*

The Department did not introduce a counter-affidavit contradicting anything in Mr. “Doe’s” affidavit. Therefore, the facts set forth in the affidavit are admitted and must be taken as

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<sup>4</sup> The second sentence of paragraph 22 of Mr. “Doe’s” affidavit (“As I noted above, during the relevant years none of these agreements were entered into in Illinois.”) duplicates the statement in paragraph 9 of Mr. “Doe’s” affidavit, but it is not conclusory.

true for purposes of “ATL’s” summary judgment motion. There is no genuine issue as to a material fact, so summary judgment is appropriate.

### **The Due Process Issue**

With regard to the constitutional due process requirement set forth in U. S. Const. Amend. XIV, § 1, the Supreme Court has held that in the case of judicial jurisdiction, due process requires that a defendant have minimum contacts with a state. Quill Corp. v. North Dakota, 504 U.S. 298, 307; 112 S. Ct. 1904 (1992).

“ATL” asserts that the mere presence of “ATL’s” rented vehicles in Illinois under the direction and control of lessees fails to establish the “minimum contacts” with Illinois by “ATL” that the due process clause of the U. S. Constitution requires. “ATL” notes that the degree of contact required between a taxpayer and a taxing state for due process is analogous to that needed for a state to exert personal jurisdiction over a defendant. Quill 504 U.S. at 307, 313 n.7. It also notes that the minimum connection between a commercial actor and a state is established “if the commercial actor’s efforts are ‘purposely directed’ toward the citizens of that state.” Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476; 105 S.Ct 2174 (1985). “ATL” argues that the record shows that it did not direct its commercial efforts toward Illinois for the purpose of making a profit. Taxpayer memo pp. 8, 9.

The Department argues that the U.S. Supreme Court abandoned a physical presence requirement under the due process clause in the area of state taxation, citing Quill, 504 U.S. at 308. Dept. memo p. 9. The Department then cites International Shoe Co. v. Washington, 326 U.S.310, 66 S. Ct.154 (1945), for the proposition that if a corporation exercises the privilege of conducting activities in a state it submits to personal jurisdiction of the state. It concludes that by leasing its trucks to lessees who controlled their routing and drove them into Illinois “ATL”

availed itself of the economic market of Illinois and that Illinois thereby gained personal jurisdiction over “ATL”. Dept. memo p. 10.

The Department also argues that Illinois gained personal jurisdiction over “ATL” because it was a named defendant in a case filed in the U.S. District Court for the Northern District of Illinois. Dept. memo. p. 24.

The Department’s argument that “ATL” subjected itself to jurisdiction in Illinois by leasing its trucks in Wisconsin ignores the fact that the lessees, not “ATL” brought the trucks into Illinois. In Quill, the Court explained that the due process clause is concerned with whether an individual has “notice” or “fair warning” of a state’s intention to exercise power over him and requires only “minimum contact”. Quill, 504 U.S. at 312. The Court summarized its decisions on due process by stating “that if a foreign corporation purposefully avails itself of the benefits of an economic market in the forum state it may subject itself to the state’s *in personam* jurisdiction even if it has no physical presence in the State.” Quill, 504 U.S. at 307.

In this case, “ATL” did not “purposefully avail itself of the benefits of an economic market in” Illinois. The lessees were not employed by or agents of “ATL”. The leased trucks were under the complete control of the lessees. It was the lessees who routed the trucks into Illinois and availed themselves of the benefits of the economic market in Illinois.

The Department argues that because “ATL” was named a defendant in a case first filed in 1995 in the U.S. District Court for the Northern District of Illinois, Illinois gained personal jurisdiction over “ATL”. This assertion is incorrect.

The Department’s assertion arises from an inquiry the Department’s litigator made in correspondence addressed to “ATL’s” counsel on January 12, 2000. In a letter addressed to the Department’s litigator, “ATL’s” counsel explained that “ATL” had been named a defendant in

several law suits brought in the Circuit Court of Cook County and in the U.S. District Court for the Northern District of Illinois resulting from an accident in 1995 involving one of “ATL’s” vehicles. The cases were settled with the plaintiffs by the lessee’s insurance company. There is no indication in the record that the court ever exercised personal jurisdiction over “ATL” in these cases. Reply memo Ex. B. Furthermore, the Department cites no authority for the proposition that personal jurisdiction obtained on a defendant in a law suit would constitute sufficient contact to satisfy the minimal contact requirement of the Due Process clause for state income tax purposes.

The record indicates that “ATL” did not have sufficient nexus with Illinois to satisfy the minimal contact requirement of the due process clause for purposes of imposing a state income tax liability.

### **The Commerce Clause Issue**

In Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076 (1977), the Court set forth a four-prong test for a state tax to satisfy the requirements of the commerce clause (U.S. Const. Art. 1, § 8). Under this test, four conditions must be met: (1) There must be a substantial nexus between the activity sought to be taxed and the taxing state; (2) The tax must be fairly apportioned; (3) the tax must not discriminate against interstate commerce; (4) The tax must be fairly related to the services provided by the taxing state. Complete Auto, 430 U.S. at 279, Quill, 504 U.S. at 312, 313. If the tax at issue as applied to a taxpayer fails any one of these tests its application to the taxpayer is unconstitutional. Brown’s Furniture, Inc. v. Wagner, 171 Ill.2d 410, 665 N.E2d 795 (1996). The Supreme Court has said that in order to satisfy the minimal connection prong of the test of the commerce clause, the business being taxed must take

advantage of “the substantial privilege of carrying on business within the state.” Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425, 437; 100 S.Ct. 1223, 1231 (1980).

The Supreme Court in Quill explained the difference in the minimal contact required by the due process clause and the substantial nexus required by the commerce clause in the following terms:

The second and third prongs [of the Complete Auto test], which require fair apportionment and non-discrimination, prohibit taxes that pass an unfair share of the tax burden onto interstate commerce. The first and fourth prongs, which require a substantial nexus and a relationship between the tax and state-provided services, limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce. [Footnote omitted.] Thus, the “substantial nexus” requirement is not, like due process’ “minimum contacts” requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce. Accordingly, contrary to [North Dakota’s] suggestion, a corporation may have the “minimum contacts” with a taxing state as required by the Due Process Clause, and yet lack the “substantial nexus” with that state as required by the Commerce Clause.  
Quill, 504 U.S. at 313.

“ATL” asserts that the tax as applied to “ATL” fails the first prong of the Complete Auto test. “ATL” maintains that it does not have substantial nexus with Illinois because all of its activities take place in Wisconsin and it is the lessees, over which “ATL” has no control, who bring the trucks into Illinois.

The Department states certain facts upon which it relies in arguing that “ATL” has substantial nexus in Illinois. The Department states that “The leases required the trucks maintain a policy of Public Liability and Property Damage Insurance with “ATL” being named the insured.” Dept. memo p. 3. The lease specifies that either the lessor or the lessee must maintain such insurance coverage. Dept. Ex. B. However, in the example adopted by the Department for its exhibit, the obligation to obtain this insurance was on the lessee. *Id.* Schedule A. Further, the

Department goes on to note that ““ATL” paid all of the existing federal, state or local taxes and licensing fees. “ATL” filed motor fuel tax reports and paid fuel tax for leased trucks for years prior and subsequent to Illinois joining the International Fuel Tax Administration (‘IFTA’). Illinois jointed IFTA beginning January 1, 1994.” Dept. memo p. 3. While these statements are true, they do not completely describe the situation. The lease makes the lessee responsible for providing fuel for the leased vehicles unless otherwise specified in the lease, and in the copy of the lease relied on by the Department as its Exhibit B, the lessee was specifically made responsible for the fuel. Dept. Ex. B ¶5 and Schedule A.

Contrary to the Department’s assertion, the lessee is “responsible for all necessary licenses, permits, taxes and fees if vehicle is operated outside the State of Wisconsin unless otherwise specified in Schedule A of this agreement.” Dept. Ex. B. ¶ 1. The lessee is also responsible for “Any increase in existing federal, state or local taxes or license fees over the amount of such taxes and fees in effect at the date such leased vehicle is placed in service, or any new federal, state, local taxes or license fees, applicable on or with respect to the vehicles leased, or by reason of the leasing thereof, shall also be paid by [lessee] to lessor as paid by lessor to the applicable public authority. Dept. Ex. B. ¶ 9. To the extent that “ATL” pays those fees, etc., the lessees reimburse it. See Dept. Ex. E. The Department’s assertion that these activities establish “substantial nexus” are unsupported by its own exhibits that, along with Mr. “ATL’s” affidavit, indicate that to the extent “ATL” does pay these fees, etc., initially, it is performing an administrative function for its customers and it is doing so in Wisconsin, not in Illinois.

The Department argues that the mere fact that “ATL’s” trucks are brought into Illinois and incur substantial mileage in Illinois establishes substantial nexus between “ATL” and Illinois apparently without regard to who brought them in. Dept. memo p. 14. The Department cites a

number of cases in support of its argument. However, they are either factually distinguishable or not decided under the commerce clause.

The first case cited by the Department is Aloha Freightways, Inc. v. Commissioner of Revenue, 428 Mass. 418, 701 N.E.2d 961 (1998). This case is distinguishable on the facts. Aloha Freightways Inc. was an Illinois-based interstate trucking company engaged in the business of transporting machinery. Aloha did not own or lease any property in Massachusetts. However, its own trucks driven by its own drivers made numerous trips into and out of Massachusetts picking up and delivering machinery. The court held that this activity in the state of Massachusetts constituted substantial nexus.

“ATL” does not conduct this kind of activity in Illinois. “ATL” is not in the trucking business. It does not drive its trucks into Illinois. It does not deliver anything to or for anybody anywhere. It is in the truck leasing business and the lessees’ drivers, over which “ATL” has no control, drive the leased trucks into Illinois in connection with the lessees’ business. “ATL” does not have the degree of contact with Illinois as the taxpayer had with Massachusetts in Aloha Freightways. This case is factually distinguishable and does not support the Department’s position.

The next case cited by the Department is Besser Company v. Bureau of Revenue of the State of New Mexico, 74 N.M. 377, 394 P.2d 141 (1964). This case also is factually distinguishable from “ATL”. Besser Company was a Michigan corporation with its principal place of business in Michigan. It had no employees located in New Mexico. Besser leased equipment that it manufactured outside of New Mexico to customers it had in New Mexico. New Mexico assessed a school tax, which was a gross receipts tax, on the rent paid to Besser by its lessees located in New Mexico. The New Mexico Supreme Court found that leasing the

equipment to customers in New Mexico provided sufficient contact between the lessor and New Mexico to justify the tax under the commerce clause. In this case, “ATL” does not lease its trucks to lessees in Illinois. It leases them to lessees in Wisconsin which then use them for travel wherever they choose. Thus, “ATL” does not have the substantial contact with Illinois that the court found between the lessor and New Mexico in Besser.

The last case relied on by the Department is American Refrigerator Transit Company v. State Tax Commission, 238 Or. 340, 395 P.2d 127 (1964). This case is distinguishable from the “ATL” case because the only constitutional argument raised in the case was on the fourteenth amendment’s due process requirement. A commerce clause issue was not raised or mentioned. Therefore, it is not relevant to the case at issue in which the commerce clause requirements are at issue.

The Illinois courts have not addressed the factual situation at issue in this case. The only court to have addressed a factual situation like this one is the Mississippi Supreme Court in Marx v. Truck Renting and Leasing Association, Inc., et al., 520 So.2d 1333 (1988). Although decisions from other states are not binding on courts in Illinois, they should be examined if they are relevant for whatever value they may offer. Kroger Company v. Department of Revenue, 284 Ill.App.3d at 481. (1<sup>st</sup> Dist. 1996) Since the facts in Marx are the same as those in this case, I find the case instructive, at least.

In Marx, the taxpayers leased trucks domiciled in states other than Mississippi for interstate travel over routes chosen by the lessees or their agents. The leases were entered into outside of Mississippi, but the trucks traveled through Mississippi on occasion. The court noted that the first prong of the Complete Auto test provided that, “the test must focus on the underlying activities conducted within the state and in order for the taxpayer to avoid such

taxation he must show that the income tax was earned in the course of activities unrelated to activities conducted with the taxing state.” Marx, 520 So.2d at 1343. The court then held that the activities which generated the taxpayers’ income were in no way related to activities they conducted within Mississippi. *Id.*

An identical situation is under consideration here. The admitted facts establish that “ATL” conducted no business activities within Illinois. Its income was not related to activities conducted in Illinois. It conducted all of its business activities in Wisconsin. Like the taxpayers in Marx, the activities which generated “ATL’s” income were in no way related to activities “ATL” conducted within Illinois. Its income was derived under the terms of its leases executed in Wisconsin by its lessees and from services provided there. Only the lessees, over whom “ATL” had no control, derived income from activities in Illinois when they drove to or through Illinois from time to time. To the extent any income was derived from driving the vehicles in Illinois it was the lessees’ income.

The Department asserts that taxpayer’s reliance on Marx is misplaced because it was decided prior to Quill. Dept. memo p. 11. However, as “ATL” points out in its memorandum, Quill did not promulgate new commerce clause standards for nexus. It reaffirmed the standard previously adopted by the court in National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 87 S.Ct. 1389 (1967).

The Department then mentions that the court in Quill pointed out that a taxpayer can have “minimum contacts” for due process purposes but lack “substantial nexus” for commerce clause purposes. Dept. memo p. 12. That is correct. However, the Department then seems to argue that the Department can impose an income tax liability on “ATL” even though it conducts no business activities in Illinois. The Department ignores the “substantial nexus” required under the

commerce clause. (U.S. Const. Art. 1, § 8) as explained in Quill. The commerce clause is concerned with discrimination against interstate commerce and requires “substantial nexus” with a state, which is more than the minimal contact required by the due process requirement. *Id.* The four-prong test set forth in Complete Auto is a commerce clause test. Quill, 504 U.S. at 303. Consequently, the first prong of the test requiring contact with the taxing state is a “substantial nexus” test, not a “minimal contact” test. The “substantial nexus” test requires a physical presence by the taxpayer in the taxing state. Quill, 504 U.S. at 311-312. It requires that the taxpayer conduct business activities in the taxing state. Mobil Oil Corp., *supra*. In this case “ATL” has no physical presence in Illinois. Only its lessees do.

The Department also tries to distinguish Marx from the case at issue based on assumptions not warranted by the facts. It argues that no deliveries were made in Mississippi by the lessees in Marx, whereas deliveries were made in “ATL’s” case. This argument fails because there are no factual assertions regarding deliveries either in Marx, Mr. “Doe’s” affidavit, or the Department’s documents.

The facts presented in Mr. “Doe’s” affidavit establish that “ATL” did not have contacts with Illinois that rise to the level of “substantial nexus”. “ATL” is a Wisconsin corporation with its principal place of business located in “Someplace”, Wisconsin. It is engaged in the business of leasing trucks to commercial businesses. Its income is derived from fixed lease fees and mileage charges paid by its lessees. It also provides ancillary services including maintenance and repairs of the trucks, licensing, and fueling. It neither owns nor leases any property, either real or personal, in Illinois. It has no employees or customers in Illinois. It had no bank accounts in Illinois. It did not provide any services in Illinois. None of “ATL’s” leases were entered into in Illinois. “ATL”, a Wisconsin corporation, was not qualified to do business in

Illinois under the Illinois Business Corporation Act, *supra*, and it did not conduct any business in Illinois.

Under the terms of “ATL’s” lease agreements, the lessee has complete dominion and control over the leased vehicles during the term of the lease. Lessees hire and control the drivers. Once leased, “ATL” has no control over the use, routing or destination of the vehicles. None of “ATL’s” lessees took possession of the vehicles in Illinois. During the years at issue, some of “ATL’s” lessees operated the leased trucks into or through Illinois. Although “ATL” owned trucks came into Illinois, they came under the direction and control of the lessees. “ATL” had no control over where they went. “ATL” transmitted fuel tax reports, sometimes accompanied by fuel tax payments, to Illinois on behalf of and as a service to lessees for fuel taxes which were apportioned between two or more states. However, filing fuel tax reports in Illinois from Wisconsin to report mileage incurred by lessees in Illinois and numerous other states is not a business activity conducted in Illinois. The facts establish that “ATL” had no physical presence in Illinois during the years at issue.

After considering the affidavit of Mr. “Doe”, and the arguments presented and for the reasons stated above, I find that there is no substantial nexus between “ATL” and the state of Illinois under the first prong of the Complete Auto test to justify the imposition of the Illinois income tax on “ATL” during the years at issue. Having decided that issue, I need not address the additional arguments presented by “ATL” or the Department.

Wherefore, “ATL’s” motion for summary judgment is granted to the extent that it asks for summary judgment holding that “ATL” is not subject to Illinois income tax for the years at issue. The other relief requested in “ATL’s” motion is denied and the Department’s cross-

motion for summary judgment is denied. My recommendation is that this order be the final disposition in this case and that the underlying Notice of Deficiency be canceled.

**ENTER: August 25, 2000**

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**Administrative Law Judge**